Case Number:	Criminal Appeal 172 of 2017
Date Delivered:	11 Dec 2018
Case Class:	Criminal
Court:	High Court at Nyahururu
Case Action:	Judgment
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	Simon Muriithi Maina v Republic [2018] eKLR
Advocates:	Ms. Rugut – prosecution Counsel
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. V, A, Ochanda – RM
County:	Laikipia
Docket Number:	-
History Docket Number:	Cr.No.2817of 2914
Case Outcome:	Appeal dismissed
History County:	Laikipia
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.172 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2817of 2914 by: Hon. V, A, Ochanda – R.M.)

SIMON MURIITHI MAINA.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Simon Muriithi Maina, the appellant, was convicted for the offence of rape Contrary to Section 3(1)(b) of the Sexual Offences Act.

The particulars were that on 30/11/2014 in Nyandarua County, intentionally caused his penis to penetrate the vagina of JWK without her consent, being a person of mental disability.

In the alternative, the appellant faced a charge of committing an indecent act with an adult Contrary to Section 11(a) of the Sexual Offences Act.

Upon conviction, the appellant was sentenced to serve 8 years imprisonment.

He is aggrieved by the conviction and sentence and preferred this appeal based on 10 grounds which can be condensed into the following:

1. That the prosecution evidence was full of contradictions;

2. That there was no medical evidence connecting the appellant to the offence;

3. That the appellant's defence was not considered;

4. That the offence was not proved to the required standard;

5. That the sentence is harsh and excessive.

The appellant prays that this court do quash the conviction and set aside the sentence and set him at liberty.

This being a first appeal, it is required of this court to re-assess all the evidence that was tendered before the lower court afresh, evaluate it and arrive at its own findings. See ***Kiilu v Republic 2005 KLR 175***. Of course, this court has to bear in mind that it did not have the opportunity to see and hear the witnesses.

The prosecution called a total of five witnesses. **PW1 JW** told the court that she was coming from church when the appellant Muriithi took her to his house, removed her pant, put her on his bed, parted her legs, removed his clothes and inserted his thing for urinating into hers; that her parents and grandparents found them in the act. She said that he raped her by force and she was later

taken to hospital.

PW2 DKK of Oljororok recalled 30/1/2014. He went home about 1.00 p.m., found the wife but not J, his daughter, (PW1) who had gone to church. J had not returned home. He went to look for her and found her in Simon Muriithi's (appellant) house, a neighbor. PW1 told him that she had been raped. PW2 said that PW1 used to have mental disturbances during the rainy season.

PW3 MK, the wife of PW2 and mother to PW1 recalled 30/11/2013; that it was a Sunday and PW1 went to church but did not return by 2.00 p.m.; they started to look for her and received information that PW1 had been seen with Muriithi; they went to Muriithi's (appellant) house where they found PW1 sitting on the bed and she started to cry. Police were called and she later took PW1 to hospital at Nyahururu.

PW4 Dr. Joseph Kinyua of Nyahururu Hospital examined PW1 on 19/3/2016 and found that vagina swab had pus cells, hymen was missing and that there was evidence that she was raped.

PW5 PC Charles Oyoo received a complaint of alleged rape on 30/11/2014, whereby the complainant was found in the appellant's house. He escorted the complainant and her parents to hospital. PRC forms and P3 forms were filed.

The appellant testified on oath that on 30/11/2014, he went to harvest potatoes with his wife Beth Wairimu. After they returned home, his grandmother sent the wife to get water; that a girl came where they were, talked to his grandmother and asked for water and his son went to get for her water; that his grandmother gave the girl tea. As they sat there, 7 men arrived, one of them had disagreed with him 8 days earlier; that they disagreed at a beer drinking place and he knocked the man with his glass and the man came with a group of others; that the person asked for Kshs.3,000/= which he gave; that the man knocked him with a jembe stick; that the girl's father was among the seven people; that the girl started to cry and walked away; that the girl's mother started to scream and people came; that police were called and he was arrested: Next day, the complainant and his wife went to the station and asked him to negotiate and he was asked to pay Kshs.10,000/= but he insisted on going to court; that he came to court, the complainant wanted to withdraw the case. According to him, one Gichimo framed him.

DW2 Daniel Gachiri Godaro heard noises at Muriithi's home on 30/11/2014, went to see what was going on and found people had gathered and they claimed that Muriithi had raped a girl.

The appellant reiterated what he had told the court in his defence, that he was framed by Gichimo. However, in his submissions he changed and said that it is the complainant's father who framed him.

Ms. Rugut Learned Counsel for the State opposed the appeal on grounds that PW1, who was mentally challenged explained to the court what happened to her, identified the appellant as the perpetrator; that there was proof of penetration; that there was no proof of a grudge between the appellant and the complainant; that though the complainant had a mental disability, she was able to identify the appellant. As for the P3 form being filled after 2 years, counsel submitted that the investigations officer explained that failure to have the doctor examine the complainant was an oversight and that she was examined with leave of the court and that the PRC documents were filled on 30/11/2014, the same date the offence was committed were produced in evidence. As for the defence, it was counsel's view that it was a mere denial.

To prove a charge of rape, the prosecution has to prove beyond any doubt the following:

1. Proof of penetration;

2. Proof that there was lack of consent;

3. Proof of identity of the perpetrator.

Section 3 of the Sexual Offences Act creates the offence of rape and reads as follows:

"Section 3(1) A person commits the offence termed rape if:

(a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) The other person does not consent to the penetration;

(c) The consent is obtained by force or by means of threats or intimidation of any kind."

The complainant, PW1, was described by PW2 and 3, her parents, as a person with mental disability. PW2, said that PW1 usually has mental disturbances during the rainy season. PW3, the complainant's mother said that she has brain problems though she knows people and can talk.

PW4, the doctor who examined the complainant also saw remarks in the treatment notes that the complainant was mentally challenged and attended a school for the mentally challenged. PW1 however testified on oath, and recalled that the appellant, whom she called Muriithi took her to his house, moved her pant put her on the bed and penetrated her private parts (the thing she uses to urinate) with the thing he uses to urinate. She was cross examined and the answers were clear and the evidence consistent. I have no doubt that she was truthful.

Although the P3 form was filled 2 years later at the time of hearing, yet the investigating officer explained that he overlooked the taking of the P3 to the doctor. But all was not lost. The complainant was taken for treatment and was examined on the same night she was found in the appellant's house, that is, 30/11/2014. The PCR forms were produced in evidence)(Ex.3) on examination, the complainant had no injuries to her genitalia but the hymen was broken and the doctor was of the view that there was evidence of vaginal penetration. Because the complainant was examined soon after the act, the officer who examined her in hospital was in a position to tell whether or not she had taken part in a sexual act. The police could have done even better had they taken the appellant's specimens for analysis but they did not. That notwithstanding, the offence took place during the day after PW1 left church. PW2 and 3 found PW1 in the appellant's house on the same day about 7.00 p.m. The appellant did not manage to get away but was arrested at the scene.

In his defence, the appellant did confirm that he was arrested at his home and that indeed the complainant was present at his home when PW2 and 3 with members of public found him.

The appellant claimed to have disagreed with one Gichimo in a bar and that he went to his home that day with others including PW2. He denied having seen PW2 before. Even if the appellant had disagreed with some other man whom he named as Gichimo there is no reason why PW1, 2 & 3 would have framed him with this offence. The name Gichimo only surfaced during the defence. The appellant had not alluded to it during cross examination of the prosecution witnesses when they could have refuted or confirmed the allegations. The appellant's narration of the events leading to his arrest are not convincing at all and the defence does not raise any doubt in the prosecution case.

DW2 who was called as a witness arrived at the scene after the appellant had been arrested and could not tell which transpired that led to the appellant's arrest.

I find that there was overwhelming evidence on record that the complainant was found in the appellant's house by her parents (PW2 & 3) who were searching for her. PW1 was examined on same day and found to have taken part in a sexual act. PW1 was aged 20 years though mentally challenged. She could therefore not have capacity to consent to such an act. PW1 ably narrated what the appellant did to her. The appellant and complainant lived in the neighborhood and I believe that the appellant knew PW1 and took advantage of her mental impairment as she was incapable of appreciating the nature of the act.

I am satisfied that the trial court arrived at the correct finding having analyzed all the evidence. The conviction is well founded and the court finds no good reason to disturb it.

The appellant complained that the sentence is harsh. The appellant was sentenced to serve 8 years imprisonment which in my view is an illegal sentence under Section 3(3) of the Sexual Offences Act. Upon conviction under Section 3(1) of the Sexual Offences Act, one is liable to imprisonment to not less than 10 years imprisonment.

I hereby set aside the unlawful sentence of 8 years imprisonment and instead substitute it with the minimum sentence under the section which is 10 years imprisonment.

The appellant will serve the said prison sentence of 10 years from the date of sentence on 28/12/2016. In the end, I dismiss the appeal in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this *11th* day of *December*, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – prosecution Counsel

Appellant in person

Soi – Court assistant